

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: . Case No. 2:13-md-02460  
. .  
. U.S. Courthouse  
NIASPAN ANTITRUST . 601 Market Street  
LITIGATION, . Philadelphia, PA 19106  
. .  
Debtor. . Monday, December 10, 2018  
. . 5:01 p.m.  
. . . . .

TRANSCRIPT OF TELEPHONE STATUS CONFERENCE  
BEFORE THE HONORABLE JAN E. DUBOIS  
UNITED STATES DISTRICT COURT JUDGE

TELEPHONIC APPEARANCES:

For the End-Payor  
Putative Class:

Wexler Wallace, LLP  
By: KEN WEXLER, ESQ.  
55 West Monroe Street  
Suite 3300  
Chicago, IL 60603  
(312) 346-2222

Spector Roseman & Kodroff, PC  
By: JEFFREY KODROFF, ESQ.  
1818 Market Street, Suite 2500  
Philadelphia, PA 19103  
(215) 496-0300

For CVS/Rite Aid  
Plaintiffs:

Hangley Aronchick Segal Pudlin &  
Schiller  
By: BARRY L. REFSIN, ESQ.  
One Logan Square, 27th Floor  
Philadelphia, PA 19103  
(215) 568-6200

For Walgreen  
Plaintiffs:

Kenny Nachwalter P.A.  
By: SCOTT E. PERWIN, ESQ.  
1100 Miami Center  
201 South Biscayne Boulevard  
Miami, FL 33131  
(305) 373-1000

TELEPHONIC APPEARANCES CONTINUED.

Audio Operator:

M. Hull, ESR

TRANSCRIBED BY:

Access Transcripts, LLC  
10110 Youngwood Lane  
Fishers, IN 46038  
(855) 873-2223  
[www.accesstranscripts.com](http://www.accesstranscripts.com)

Proceedings recorded by electronic sound  
recording, transcript produced by transcription service.

APPEARANCES (Continued):

For the Direct  
Purchaser Putative  
Class:

Berger Montague, P.C.  
By: NICHOLAS URBAN, ESQ.  
DAVID F. SORENSEN, ESQ.  
1818 Market Street, Suite 3600  
Philadelphia, PA 19103  
(215) 875-3000

Garwin Gerstein & Fisher LLP  
By: DAN LITVIN, ESQ.  
88 Pine Street, 10th Floor  
New York, NY 10005  
(212) 398-0055

Heim, Payne & Chorush, LLP  
By: MIRANDA JONES, ESQ.  
1111 Bagby, Suite 2100  
Houston, TX 77002  
(713) 221-2017

For Abbvie Defendants:

Drinker, Biddle & Reath LLP  
By: JOHN YI, ESQ.  
PAUL H. SAINT-ANTOINE, ESQ.  
One Logan Square, Ste. 2000  
Philadelphia, PA 19103-6996  
(215) 988-2700

Munger Tolles & Olson LLP  
By: STUART N. SENATOR, ESQ.  
JONATHAN S. MELTZER, ESQ.  
350 South Grand Avenue, 50th Floor  
Los Angeles, CA 90071-3426  
(213) 583-9528

For TEVA Defendants:

Kirkland & Ellis, LLP  
By: DEVORA ALLON, ESQ.  
DMITRIY TISHYEVICH, ESQ.  
THOMAS BURNETT, ESQ.  
601 Lexington Avenue  
New York, NY 10022-4611  
(212) 446-4800

For Giant Eagle:

Marcus & Shapira, LP  
By: BRIAN HILL, ESQ.  
One Oxford Centre, 35th Floor  
Pittsburgh, PA 15219  
(412) 338-5212



1 (Proceedings commence at 5:01 p.m.)

2 THE COURT: This is Judge DuBois. Good afternoon.

3 MR. SORENSON: Good afternoon, Your Honor.

4 THE COURT: We're going to conduct our previously  
5 scheduled telephone conference in the Niaspan Antitrust  
6 Litigation, MDL No. 13-2460. I'm not going to take roll. I  
7 gather, and I just want to hear that counsel are present.

8 Counsel for the end-payor putative class, liaison  
9 counsel?

10 MR. WEXLER: Yes.

11 MR. KODROFF: Yes, Your Honor.

12 THE COURT: Direct purchaser putative class?

13 MR. SORENSON: Yes, Your Honor.

14 THE COURT: Interim counsel for Abbvie? Interim  
15 liaison counsel --

16 MR. SENATOR: Yes.

17 THE COURT: -- for Abbvie.

18 MR. SAINT-ANTOINE: Yes, Your Honor.

19 THE COURT: The Teva defendants?

20 MS. ALLON: Yes, Your Honor.

21 THE COURT: Walgreens plaintiffs?

22 MR. PERWIN: Yes, Your Honor.

23 THE COURT: CVS/Rite Aid plaintiffs?

24 MR. REFSIN: Yes, Your Honor.

25 THE COURT: And Giant Eagle plaintiffs?



1 MR. HILL: Yes, Your Honor.

2 THE COURT: All right. Good. I thought we would  
3 pick up on several of the things that were addressed in the  
4 last telephone conference. First, the duplication of expert  
5 witness evidence. The effort to call experts was not in my  
6 judgment successful at all. And I'm wondering whether the  
7 timing of my request that this be done was too early. I  
8 suspect that it was.

9 And my thought is that we ought to wait until rulings  
10 on class certification and summary judgment and then sit down  
11 and address the question of duplication of expert witness  
12 evidence. I can tell you now we will not have 32 expert  
13 witnesses at this trial. The number of experts called will be  
14 far -- well, far less, I'll just put it that way, than 32. I  
15 can see now with parties now knowing which parties will remain  
16 in the case having to duplicate expert testimony just to make  
17 certain if another party's expert is unavailable that you will  
18 have an expert available. But we are not going to have experts  
19 from different parties getting on the witness stand and saying  
20 something that is either identical or practically identical.

21 Does anyone have any comments on that?

22 MR. SORENSON: Your Honor, this is David Sorenson for  
23 the direct purchaser class plaintiffs. As the Court just  
24 outlined its thinking speaking for the direct class, we agree  
25 with what you said. We understand your comments about



1 ultimately the number of experts at trial being lower than the  
2 current list. We understand that and hear you. But we agree  
3 that it is premature for all the reasons that you just  
4 mentioned and outlined in our letter.

5 THE COURT: Anyone else?

6 MS. SENATOR: Your Honor, this is Stewart Senator for  
7 the Abbvie defendants. I certainly understand, Your Honor's --  
8 you and we laid out our reasoning of why we thought it should  
9 be a bit earlier in our letter. But, obviously, it's the  
10 Court's decision. I would say that perhaps we could after  
11 class certification figure out if that's the appropriate time  
12 or after summary judgment if that's the appropriate time. I  
13 don't know if we need to settle on the exact appropriate time  
14 today.

15 THE COURT: No. I don't think we do, and I hadn't  
16 intended to do that. And I agree with your suggestion,  
17 Mr. Senator, that we see whether this can be pared after I rule  
18 on the motion for class -- motions for class certification.  
19 That's a good idea. And we'll do that. We'll revisit this.

20 There's really no limit on when we revisit things,  
21 and this is not exactly a time sensitive issue. It's something  
22 we have to decide, and I didn't want you to start thinking  
23 about it on the eve of the day on which we'll have to decide  
24 it. I want you to be thinking about it now. And so that's  
25 something we can place on the agenda for future telephone



1 conferences.

2 || Anyone else have a comment on that issue?

3 (Pause)

4 THE COURT: Somewhat related to expert witness  
5 evidence, I told you I thought I would need a tutorial on the  
6 technology involved. And I also mentioned the use of a  
7 technical advisor. I don't know enough about the patent  
8 related issues to know now just what we should do on that  
9 issue, the issue of a technology advisor.

10 Have the plaintiffs discussed that among themselves?

11 MR. SORENSON: Your Honor, this is David Sorenson  
12 again for the direct class. No, we have not discussed that  
13 issue. One comment I would make is that similar to the expert  
14 issue just discussed, this seems to be something that will come  
15 up later. In other words, if the next case event is class  
16 certification of the two proposed classes, it's not apparent or  
17 obvious to me that in that context patent issues at this level  
18 of depth will become pertinent given, you know, what's -- what  
19 the legal standards for classification and what should and  
20 should not be delved into and decided.

21           The patent issues at in-depth would appear to me to  
22 be more something that goes to the merits of the case, and so  
23 is something that would come up more directly, let's say, at  
24 summary judgment. That's one reaction I have, but --

25 THE COURT: Oh, I agree with you.



1 MR. SORENSON: -- to directly again answer your --

2 THE COURT: I agree with you, but --

3 MR. SORENSON: Okay. I'll stop there.

4 THE COURT: -- I don't know -- I've done this in one  
5 case and it took a little time to set things up. And so I want  
6 to try to anticipate to the extent I can. But I agree with  
7 you. I see no need for a technical advisor in connection with  
8 motions for class certification. And that's what we'll do. I  
9 just want you to keep that issue in mind in the future.

10 Let me ask some questions about the technology. Is  
11 this a two-schools of thought case? In other words, are there  
12 two distinct schools of thought on the science involved?

13 MR. SORENSON: Miranda Jones, are you on the phone?

14 MS. JONES: Yes, I am.

15 MR. SORENSON: I'm going to -- this is David  
16 Sorenson. I'm going to ask, not to put her on the spot, but  
17 Ms. Jones is focused on patents, so I'd ask her in her the  
18 first instance to response.

19 MS. JONES: Your Honor, Miranda Jones from Heim,  
20 Payne & Chorush. I believe that this is not the case where  
21 there is a substantial difference between the technical experts  
22 but, of course, defendants' counsel can correct me if they  
23 believe differently. I think that it's not a truthful defraud  
24 case. I think the difference is they're more in the  
25 application of the specific facts and the specific technology.



1 THE COURT: Give me an example of the patent issues  
2 that will have to be litigated.

3 MS. JONES: So right now the central issue of dispute  
4 relates to public use and whether or not the clinical trial  
5 that Kos conducted in its preparation of Niaspan constituted a  
6 public use. And so there appears not to be a dispute that the  
7 product that was used during this clinical trial met the  
8 limitations of the claims that are asserted in the underlying  
9 litigation. And so there's not technical disputes as to the  
10 science so much as technical disputes as to the circumstances  
11 regarding whether or not that use was sufficiently public.

12 THE COURT: And I've had those issues in other cases.  
13 And I don't think they require a technical advisor. Are there  
14 any issues that you can anticipate now that would require a  
15 technical advisor?

16 MS. JONES: I think that there are some disputes as  
17 to the treatment limitations of some of the patent claims,  
18 specifically side effects and how those side effects relate to  
19 the patent claims. I suspect that there's more of a dispute in  
20 the technical factual details there than there might be for  
21 some of the composition limitations.

22 THE COURT: And that issue that you've just  
23 identified you think is critical to the question whether the  
24 generic should have launched at risk. Is that what you're  
25 telling me?





1 MS. JONES: Well, those questions are critical to  
2 whether or not the patent claims were valid and infringed,  
3 which I believe play into that decision.

4 THE COURT: Okay. All in all, it doesn't sound, I'm  
5 going to use the phrase "that technical." But it's something I  
6 want you to keep in mind. And in any event, I'm going to want  
7 a tutorial. And the question is whether we do it by lawyers or  
8 with an expert or experts or -- and but I leave that for  
9 another day as well.

10 You clarified, for now at least, for me the fact that  
11 the patent issues do not appear to be nearly as technical as  
12 they were in the last patent case I tried, a cell phone case.  
13 I didn't realize how many patents there were in that slim cell  
14 phone of mine but there are lots and they're very technical and  
15 very difficult to grasp.

16 All right. Is there anything that needs to be --  
17 anything else that needs to be discussed with respect to expert  
18 witness evidence or the patent issues?

19 Hearing nothing, I got your joint settlement report  
20 on November 16th. And I'm not certain whether you are in  
21 disagreement. Plaintiffs stated that ADR with an outside  
22 mediator might be of assistance shortly after the close of  
23 expert discovery on February 8th. Defendants stated that ADR  
24 with an outside mediator might at some point be useful but not  
25 at this juncture. Well, that juncture was November 16th. And



1 what the plaintiffs have said is that they think an appropriate  
2 time for exploring ADR would be after February 19th -- February  
3 8th.

4 MS. ALLON: Your Honor, this is Devora Allon for  
5 Teva. Perhaps I should speak to that for the defendants.

6 THE COURT: Yes, you may.

7 MS. ALLON: So I don't think the plaintiffs and the  
8 defendants are on the same page. The plaintiffs are of the  
9 view that when expert discovery closes, that would be a good  
10 juncture for alternative dispute resolution. The defendants,  
11 at least for Teva, are of the position that until we receive  
12 revised and lowered settlement demands from the plaintiffs,  
13 alternative dispute resolution will not be meaningful. So it's  
14 not a question of the passage of time or the close of expert  
15 discovery that at issue for us.

16 THE COURT: All right. Anyone else from the defense  
17 want to comment? And then I'll hear from the plaintiffs?

18 MR. SAINT-ANTOINE: Paul Saint-Antoine for Abbvie  
19 defendants. Our view is that we've -- counsel has dealt with  
20 other cases before. We've settled cases without a mediator.  
21 We've settled cases with a mediator. Sometimes we found that  
22 it's helpful and other times -- frankly, I think more recently  
23 -- we found that it was unnecessary or even a just more process  
24 that was an impediment. So our view is we believe we can --  
25 it's not the type of situation where there's some sort of



1 animosity or feelings between the party and the counsel that  
2 gets in the way of direct talks so we can -- we don't view this  
3 as a case where one has to get a mediator involved. We do  
4 understand that sometimes there are circumstances that arise  
5 that it just makes it easier. But we believe we and plaintiffs  
6 can identify such circumstances. And if they arise, we know  
7 what to do.

8           THE COURT: Well, yes, you can say that in every  
9 case. But that doesn't really move the ball very far. And  
10 I've had a number of MDLs, as you no doubt know. The last one  
11 was not settled until the eve of trial, but that which  
12 triggered the settlement was, well, a ruling on damages that I  
13 issued after I ruled on summary judgment and a very fine  
14 mediator.

15           I chaired the Court's ADR Committee for many years.  
16 We've folded that committee into the civil business committee  
17 as of now, but the bottom line, I think that saying that the  
18 parties will get together and discuss settlement when they  
19 think it's appropriate is not a way to settle very many cases.  
20 And certainly not a way to settle a case where the demand is  
21 what it is in this case.

22           And what I don't want to do because I think it's a  
23 sign of poor case management, I don't want to let this case  
24 kind of slip and slide through all the processes, get to the  
25 point where we're just about ready to go to trial and then be



1 told, Judge, we're seriously pursuing settlement and think that  
2 we have a settlement in principle or better yet a settlement, a  
3 final settlement. That's not swift.

4           The idea is to get people thinking realistically  
5 about settlement at an appropriate time. And the appropriate  
6 time is not often -- well, not necessarily, I'll use that word,  
7 the time that counsel think is appropriate. Certainly wasn't  
8 appropriate to settle the last MDL I settled in May, Blood  
9 Reagents, three weeks before the start of the trial, which was  
10 scheduled to last I guess three or four weeks. That was too  
11 late. So we're going to do something about this, but I gather  
12 there's absolutely no interest in pursuing it now. And --

13           MR. WEXLER: Your Honor, this is Ken Wexler for the  
14 end-payors. Am I interrupting you? I don't want to.

15           THE COURT: No. No, I was about to say something  
16 else and then decided not. Go ahead.

17           MR. WEXLER: Oh.

18           THE COURT: Mr. Wexler?

19           MR. WEXLER: I'm sorry.

20           THE COURT: No, go ahead.

21           MR. WEXLER: We're not going to jumpstart it if the  
22 defendants say we will consider ADR if you the plaintiffs  
23 negotiate against yourself. I mean there doesn't really seem  
24 to be any appropriate time under those circumstances. And so  
25 it's a little frustrating hearing Ms. Allon say that. We've



1 heard it before. But we at least from the end-payor side made  
2 a very good faith demand, and we are not going to negotiate  
3 against ourselves but are perfectly willing to sit with a  
4 mediator and try to find some way to resolve it.

5 But to say that the other side has to come down or  
6 change their number without anything from our adversary is just  
7 not realistic at all.

8 THE COURT: Well --

9 MR. WEXLER: And it's not moving the ball.

10 THE COURT: I don't know how realistic your -- well,  
11 your demand, I don't think your demand is holding things up.  
12 But I really think it might be the -- your counterparts, the  
13 direct payor plaintiffs. And the bottom line, I'm not going to  
14 share the figures and I have to think on that because the  
15 figures were submitted in confidence. And I'm not certain how  
16 that's working.

17 I do know that if I were to order mediation now, it  
18 undoubtedly would be off to a rough start and I'm not going to  
19 do that. But I want to think about this, and I can tell you  
20 I'm not satisfied with leaving the case in the status quo with  
21 respect to settlement. I'm going to do something that will  
22 precipitate it or precipitate discussions. And I'm not certain  
23 now what that is, but I am certain that this is not the right  
24 time or the right time to do so.

25 I don't know whether the -- anyone's figures are out



1 of line. I really haven't given much thought to damages. I  
2 can tell you that the total figures are rather substantial, as  
3 large as I've had in any case ever that I've had on my  
4 calendar. So for now, I'm going to -- well, I'm not going to  
5 pursue mediation.

6 Have the plaintiffs' side, anyone on the plaintiffs'  
7 side, given any thought to specific mediators?

8 MR. SORENSON: Your Honor, this is David Sorenson.  
9 We haven't discussed amongst ourselves names of mediators.  
10 We've all been in mediation together, and there's what I'll  
11 call a short list that the plaintiffs would probably be able to  
12 come up with, you know, fairly quickly of, you know, between  
13 one and three mediators that all the plaintiffs have used  
14 probably on more than one occasion in recent cases.

15 So the short answer is no, we have not specifically,  
16 but we could do that fairly quickly.

17 THE COURT: Well, it's one thing to come up with a  
18 name. It's another thing to come up with a realistic schedule.  
19 Some mediators are booked months in advance, the good ones are.  
20 And it's very hard to schedule things.

21 Same question for defendants, have you given any  
22 thought to the mediator?

23 MS. ALLON: We have not, Your Honor.

24 THE COURT: There have been some other pay-for-delays  
25 cases. Have any of the defendants been involved in any of

1 those cases?

2 MR. SENATOR: We have, Your Honor.

3 THE COURT: Is that --

4 MS. ALLON: We have, as well, Your Honor.

5 THE COURT: That's Teva and Abbvie?

6 MR. SENATOR: Yes.

7 THE COURT: Which ones?

8 MR. SENATOR: For Abbvie, we were involved in  
9 Niaspan. I'm sorry, that's our case. Hytrin. We were  
10 involved in --

11 THE COURT: What was the --

12 MR. SENATOR: -- Androgel, which is still going on.

13 THE COURT: Mr. Senator, what was the first one?

14 MR. SENATOR: Hytrin, or sometimes it's called  
15 Terazosin --

16 THE COURT: Yes.

17 MR. SENATOR: -- Hydrochloride.

18 THE COURT: Yes.

19 MR. SENATOR: It was before a judge in Miami.

20 THE COURT: Which one?

21 MR. SAINT-ANTOINE: Judge Seitz, Your Honor. Judge  
22 Seitz.

23 THE COURT: Okay.

24 MR. SENATOR: Justice Seitz, yeah.

25 THE COURT: Okay. And --



1 MR. SENATOR: We're also involved in Androgel in  
2 Georgia before Judge Thrash.

3 THE COURT: Have you considered mediators in either  
4 of those cases?

5 MR. SENATOR: Well, Hytrin's over and for many years.  
6 We did use a mediator in that case with some of the same  
7 counsel who are on the phone now. Androgel, I'll let -- I'm  
8 actually not personally involved in that case, but I know  
9 Mr. Sorenson is so I'll let him -- I'll defer to him on a  
10 particular mediator.

11 MR. SORENSON: Your Honor, Androgel is not settled.  
12 Maybe Scott or Barry can remind me, I don't recall any  
13 mediations in that case. Well, I think there was one -- we  
14 take that back. There was a meeting, but it was only counsel,  
15 I believe.

16 MR. PERWIN: That's my recollection, also. This is  
17 Scott Perwin, Your Honor.

18 THE COURT: This is John Thrash's case in Georgia?

19 MR. SORENSON: Yes.

20 MR. PERWIN: That's correct, Your Honor.

21 THE COURT: And that case is ongoing?

22 MR. PERWIN: Correct.

23 THE COURT: Mr. Senator, do you remember the name of  
24 the mediator involved in Hytrin Terazosin case?

25 MR. SENATOR: Yes. It was Eric Green.





1 THE COURT: And I gather he got it settled?

2 MR. SENATOR: It did -- well, it settled as to all  
3 but one plaintiff, and that plaintiff went to trial. It was --  
4 that one plaintiff was Kaiser Healthcare, and it did not  
5 settle. And they -- it was remanded -- you know, it was an  
6 MDL, so their particular case is remanded to the Central  
7 District of California here, and we tried that case. And the  
8 defendants prevailed at trial.

9 THE COURT: Well, when was the Hytrin case mediation?  
10 Do you have any recollection of the timing?

11 MR. SORENSON: I think about 2002 or 2003.

12 THE COURT: No, that's not what I was thinking of.  
13 I'm thinking --

14 MR. SORENSON: Oh, I'm sorry.

15 THE COURT: -- when in the course of the case, before  
16 summary judgment --

17 MR. SORENSON: Oh, I'm sorry.

18 THE COURT: -- after summary judgment? No, my  
19 question wasn't that clear. Before summary judgment, after  
20 summary judgment, or don't you remember?

21 MR. SORENSON: I know there were summary judgment  
22 rulings before settlement but what I don't recall is whether --  
23 there may have been multiple mediation sessions. I know it  
24 settled after summary judgment rulings --

25 THE COURT: Okay.



1 MR. SORENSON: -- but before trial. But I just  
2 don't recall the precise progress of the mediations.

3 MR. PERWIN: Right. And in that case, Your Honor, I  
4 also don't recall the precise sequence. That case went up to  
5 the Eleventh Circuit and then back down and continued on after  
6 it went back down. So I don't -- I also don't recall off the  
7 top of my head exactly when it mediated.

8 THE COURT: Well, I gather that the mediation didn't  
9 occur while expert discovery was ongoing or at the end of  
10 expert discovery. In any event, it's an issue that I'm not  
11 going to drop. I'm not going to adopt Teva's position that  
12 we're not discussing settlement because the demands are too  
13 high and then hearing from the plaintiffs we're not bidding  
14 against ourselves. They're comments that lawyers utter all the  
15 time and I take them with I'll say a grain of salt because  
16 there is an appropriate time to address settlement in this  
17 case. And we'll have to find it, and we'll try to get there by  
18 agreement. We're not going to do it today. But I want you to  
19 be thinking about that.

20 And one thing I don't want you to do, and I'll remind  
21 you of these telephone conferences in which we discuss that  
22 point, I don't want to be end up settling this case as was the  
23 case in Blood Reagents on the eve of trial after lots of money  
24 was expended that really didn't have to be expended. But that  
25 means this issue which prompted the settlement was -- well, it



1 was a price-fixing case, and the issue was the lingering effect  
2 damages.

3 Have any of you experienced any case in which  
4 lingering effects damages were an issue? Anyone know what they  
5 are?

6 UNIDENTIFIED: Not exactly, Your Honor.

7 THE COURT: Well, I hadn't realized it was a case of  
8 first impression. I've been tempted to write on it, not an  
9 opinion. A lingering effects damages occur maybe after a  
10 cartel is over. In that case, I ruled that there was no  
11 evidence of price-fixing after a certain date. And the  
12 lingering effects damages are the damages that follow at the  
13 end of cartel. The damages don't drop to zero. The prices  
14 don't become competitive overnight. And the plaintiffs'  
15 damages model is what I ruled on, but it was so absurd, it was  
16 a piece of cake. They should have reached the same conclusion.

17 The theory that was rejected, that I rejected was one  
18 in which their expert said lingering effects damages continue  
19 like forever. And that was absurd. He said the difference  
20 between the bought-for price and the actual price should  
21 continue. And that's not true in real life, and we found some  
22 authority for the contrary. And that's what got that case  
23 settled.

24 It doesn't seem to me as though that is an issue  
25 that would occur in this case.



1 MS. ALLON: Your Honor?

2 THE COURT: Yes?

3 MS. ALLON: Actually --

4 UNIDENTIFIED: Your Honor?

5 MS. ALLON: -- I do think there's an analogous issue.

6 This is Devora Allon for Teva. There is a disagreement  
7 certainly with respect to the indirect purchaser's and the  
8 defendants as to whether the effects of any allegedly  
9 anti-competitive behavior continue after actual generic entry  
10 and how long after that damages can occur. And I think the  
11 point that you just made is a similar point that they are  
12 making in this case that they have damages essentially  
13 continuing out that in the but-for world well beyond prices in  
14 the actual world. so those two prices never merge. So I do  
15 think there's an analogous issue in this case.

16 THE COURT: Sounds like it is.

17 MR. SORENSON: Your Honor?

18 MR. KODROFF: Your Honor, this is Jeff Kodroff.

19 MR. SORENSON: Yeah, go ahead, Jeff.

20 MR. KODROFF: Yes. As counsel in both the blood  
21 reagents case and in this case, there's some fundamental  
22 factual differences between the generic suppression case before  
23 you now and the traditional anti-trust conspiracy cases, a case  
24 like blood reagents. I don't need to get into an argument. I  
25 just wanted to note there are some --



1 THE COURT: Oh, I think there are, but the concern in  
2 blood reagents was continuing damages after the end of the  
3 cartel. And the Teva point is something that is ripe. It's  
4 certainly not on all fours, but it's related.

5 I was surprised at how little was written about it.  
6 A former federal trade commissioner whose name escapes me --  
7 begins with a K -- and we've talked about antitrust issues down  
8 through the years, he's now a professor. In any event, he  
9 wrote on it. But there's very little written on what I can  
10 describe.

11 In any event, that's what got blood reagents settled.  
12 And it should have settled earlier. And I'm determined to do  
13 what I can to cause this case to get into a settlement mode at  
14 an appropriate time and to do what I can to put it there. I  
15 don't know that I can do anything else now. The plaintiffs  
16 certainly have a significant interest in settlement  
17 discussions. And if they think their separate demands to me  
18 were high and not inclined to cause a response, then I for now  
19 at least I leave to them the question whether they're going to  
20 lower their demands. And that applies to everyone.

21 But bidding against yourself makes absolutely no  
22 sense when you're talking about a demand that's out of line.  
23 If you think the demand is realistic, and you don't have to say  
24 anything on this issue now, then don't budget. But if it's out  
25 of line and you agree it was just a starting point, then I



1 think it behooves you to say so when the time is right to begin  
2 settlement discussions.

3 All right. Anything else we have to discuss on the  
4 question of settlement?

5 All right. Hearing nothing, I'm awaiting receipt of  
6 class certification motions. I gather they'll be filed next  
7 Wednesday. Is that correct? That's the schedule date,  
8 December 19th. Are we on target?

9 MR. SORENSON: Yes, Your Honor.

10 THE COURT: Good.

11 MR. SENATOR: Yes, Your Honor.

12 THE COURT: All right. Well, then the rest of the  
13 schedule is in place. We've already talked about technology  
14 advisor. This isn't the time to press forward with that. The  
15 seventh amended scheduling order is in place, the corrected  
16 seventh amended scheduling order. I signed the order regarding  
17 certain expert witnesses, I guess Kurt Karst and John Clark.  
18 You got copies of that order?

19 MR. SORENSON: Yes, Your Honor.

20 THE COURT: Okay, Well, then that's done. I see no  
21 other issues except for the scheduling of the next telephone  
22 conference. Does anyone have any issues to present?

23 Hearing nothing, let's talk about the next  
24 conference. Let me play off what's set for in the schedule.  
25 Expert depositions close February 8th. Opposition to class



1 cert February 25th and replies March 25th. What is the  
2 thinking among the plaintiffs on the scheduling of another --  
3 the next telephone conference? Sometimes after --

4 MR. SORENSON: Your Honor?

5 THE COURT: Yes. Go ahead.

6 MR. SORENSON: Yeah. This is David Sorenson. Two  
7 things that come to mind. One would be after the close of  
8 expert discovery, so the week of February 11th or the week of  
9 February 18th or, alternatively, after the defendants have  
10 filed their opposition to class on February 25th and then  
11 Daubert motions something like February 26th to 27th might be  
12 an appropriate time in case something has come up because of  
13 defendants' filing, either they've raised or we perceive that  
14 they've raised or something, might be a logical time.

15 So either -- I mean I don't have -- I'm not related  
16 to either of these. I just -- they sort of jump out of me from  
17 just looking at the schedule.

18 THE COURT: Let me hear from the defendants. And by  
19 the way, if any issues come up that you think require  
20 adjudication and you need a telephone conference to present  
21 them, you can do that. You know that?

22 MR. SORENSON: Yes, Your Honor.

23 THE COURT: So you don't have to wait for the next  
24 conference.

25 What do the defendants have to say on timing of the

1 next conference?

2 MS. ALLON: Your Honor, this is Devora Allon. I  
3 think probably after the close of expert discovery makes sense.

4 THE COURT: Okay.

5 MS. ALLON: So the week of February 11th or February  
6 18th.

7 THE COURT: All right. Let me look.

8 (Pause)

9 THE COURT: February 8th is a Friday. February 11th,  
10 let's see what I have on that week. Right now not a trial. I  
11 just finished a month-long trial that sort of tracks what is  
12 going on in the Southern District of New York. It's an  
13 election violation case, and it's much like Michael Cones case.  
14 And I'm just sort of getting back. I've been on trial for the  
15 whole month of November.

16 I don't have anything on the week of the 11th or the  
17 week of the 18th except the 18th's a holiday. Why don't we  
18 schedule this so that I can -- well, it doesn't really matter.  
19 I'm not going to have to review anything. Why don't we  
20 schedule this for the end of the week of the 11th, Friday, the  
21 15th?

22 MR. SENATOR: Your Honor, could I -- this is Stewart  
23 Senator. I just -- if it's all the same to the Court, I'd  
24 request not Friday because that's just the beginning of the  
25 President's Day weekend.





1 THE COURT: Oh. You're right. When do you start  
2 that President's Day weekend? Is that a Thursday start or a  
3 Wednesday start?

4 MR. SENATOR: So we celebrate early in California.

5 THE COURT: Do you want to do it on Thursday?

6 MR. SENATOR: That would be better. Thank you, Your  
7 Honor.

8 THE COURT: My note says it's that --

9 MR. SORENSON: Stewart, that's Valentine's Day, just  
10 so you know.

11 MR. SENATOR: That's Valentine's Day.

12 THE COURT: Valentine's Day.

13 UNIDENTIFIED: Thank you, Stewart. We need you --

14 MR. SENATOR: Well, now I'm getting in trouble with  
15 somebody else.

16 THE COURT: We can do it -- you want to do it  
17 Wednesday at four o'clock?

18 MR. SENATOR: Great.

19 MR. SORENSON: That's fine.

20 THE COURT: Wednesday, the 13th, February 13th,  
21 four o'clock. Who will initiate?

22 MR. SORENSON: Your Honor, this is David Sorenson.  
23 I'm happy to do it again. I'm on a roll.

24 THE COURT: All right. Is there anything else we  
25 have to talk about? Speak up if there is.



1           Hearing nothing, I'll end the conference. Thank you  
2 all very much. As I noted at the beginning -- well, I didn't  
3 note at the beginning. But we're recorded, so there's a  
4 transcript of everything that we've decided. There will be a  
5 transcript of everything we've decided. Have a good evening,  
6 everybody.

7           MR. SORENSON: Thank you, Your Honor.

8           UNIDENTIFIED: Thank you, Your Honor.

9           THE COURT: Bye now.

10           (Proceedings concluded at 5:42 p.m.)

11                           \* \* \* \* \*

12

13

14

15

16

17

18

19

20

21

22

23

24

25



C E R T I F I C A T I O N

I, Dipti Patel, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

*Dipti Patel*

DIPTI PATEL, AAERT NO. 997      DATE: December 14, 2018  
ACCESS TRANSCRIPTS, LLC

C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

*Alicia J. Jarrett*

ALICIA JARRETT, AAERT NO. 428      DATE: December 18, 2018  
ACCESS TRANSCRIPTS, LLC

